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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re NAOMI K. et al., Persons Coming Under the Juvenile Court Law.	C076699
BUTTE COUNTY DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES, Plaintiff and Respondent, v. ADAM K., Defendant and Appellant.	(Super. Ct. Nos. J36980, J36981, J36982)

Adam K., father of the minors, appeals from the judgment of disposition. (Welf. & Inst. Code, § 395.)[1] Father asserts he was denied due process because the same judge who issued a restraining order in a pending family law case involving father and mother

[1] Undesignated statutory references are to the Welfare and Institutions Code.

also presided over the dependency case and considered the family law case and the restraining order in making its dependency rulings. Father further argues that the allegations of the petitions, as sustained, do not support jurisdiction over him. Father contends that as a noncustodial parent he was entitled to custody pursuant to section 361.2 and there was no clear and convincing evidence that it would be detrimental to the three minors to place them with him. Finally, father argues that the court and the Butte County Department of Employment and Social Services (the Department) failed to comply with the inquiry and notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. §§ 1901-1915). We shall affirm the judgment of disposition.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2013, the Department filed petitions to detain the three minors, Michael K. (age 7), Jeremiah K. (age 3), and Naomi K. (age 23 months), alleging, inter alia, that mother physically injured Michael by hitting him with a belt. The petitions were subsequently amended to include both modified charging allegations and parental denials of the alleged facts.[2]

The detention report stated that Michael told the social worker that mother was always mean and spanked him with a belt. He said mother was always spanking him and his siblings and he wanted her to die. Michael said mother's boyfriend spanked Jeremiah

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[2] As amended at the jurisdictional hearing, the petitions alleged that mother hit Michael with the metal end of a belt, left injuries still visible two weeks later, and regularly used excessive corporal punishment. Mother denied these allegations. The petitions further alleged that mother permitted her boyfriend to hit the children with a belt as a regular form of discipline. Mother also denied that the children ever told her they were being hit by her boyfriend and she would never allow anyone else to discipline her children. The petitions alleged father was currently homeless, did not have adequate provisions to care for the children, and that there was an active restraining order against father, which included the children as protected persons, due to domestic violence by father against mother. Father denied perpetrating domestic violence against mother and said he had housing and adequate provisions for the minors.

with a belt and that he did not feel safe at home. When the social worker went to pick up the other two minors, Jeremiah ran out to show the social worker a welt on the side of his mouth and a swollen lip. Mother admitted spanking the minors but denied using a belt.

After detaining the minors, the social worker met with father who said that mother fabricated a story that he attacked her, which was the basis for the restraining order entered in the family law case. Father had asked for supervised visits in the family law case because he was afraid of mother and her lies. The social worker arranged a visit between the minors and father that went well. The minors were happy to see father who was kind and affectionate to them even when Michael acted out.

At the detention hearing on November 18, 2013, both parents were present and the court set a contested hearing with both the pending criminal and family law cases. The next day, the court continued the contested hearing but modified the family law restraining order to permit the Department to supervise father's visitation.[3] The court ordered the minors detained at the contested hearing.

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[3] This court previously deemed father's request to augment the record with the "records and pleadings pertaining to the restraining orders issued in Family Case number FL042762" as a request for judicial notice and granted judicial notice of "[a]ll applications for restraining orders, any restraining orders issued, both temporary and final, and all modifications of those orders made by the juvenile court."

The documents provided indicate mother first sought a restraining order in November 2012 to protect her and the minors from father. That request was denied in January 2013. Mother filed a second request in May 2013; Judge McNelis granted a temporary restraining order and set a hearing date. After the hearing, Judge McNelis extended the temporary restraining order and set a further hearing. In July 2013, Judge Keithley issued a three-year restraining order that included supervised visitation for father, a stay-away order requiring father to keep 100 yards away from the minors' school or child care, and allowing father limited contact with the minors in a medical emergency. In November 2013, after the dependency petition was filed, the juvenile court judge (Judge Keithley) modified the restraining order to permit the Department to supervise father's visits with the minors. In March 2014, father requested a modification of the restraining order to remove the minors as protected parties and attached a declaration in support of the

At the jurisdictional hearing on December 5, 2013, the court modified the petitions to include father's denial of domestic violence against the mother. Father then executed a waiver of his right to a contested jurisdictional hearing and submitted on the petitions as amended. The hearing was continued at mother's request for a possible contested hearing.

The contested jurisdictional hearing commenced in March 2014. The family law file was in the courtroom. The court and counsel proceeded to modify the petitions, reorganizing the charging allegations and including the parents' denials of the alleged acts. Father again submitted on the petitions with the additional modifications. The Department elected to proceed on the petitions and the detention report. The jurisdiction report was not received in evidence. The court sustained the petitions as amended and ordered that the family law file be available at disposition.

The disposition report stated that father's position was that the minors should be placed with him as a "non-offending" parent; he wanted the current restraining order modified so that he could take custody of the minors. Father was willing to take parenting classes to improve his parenting skills. The report stated father was slow to engage in services, lacked steady employment, and seemed unable to overcome his resentment of mother, bringing up the restraining order issues each time he met with the social worker. Three months after the assessment, he had attended a few meetings but did not feel the Marijuana Anonymous meetings were a fit for him. Father continued to

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modification. Judge Keithley heard the request as part of the contested dispositional hearing in May 2014 and modified the restraining order by removing the minors as protected persons and permitting father to attend the minors' school if authorized by the Department and also permitting father supervised or unsupervised visitation as authorized by the Department during the pendency of the juvenile dependency case.

smoke marijuana and said he had a current Proposition 215[4] recommendation. Father was referred to the Parent Support Group in November 2013 and had to be reminded twice before attending a single meeting. He completed the group in March 2014. Thereafter, he was referred to three other parenting classes. The report stated that the Department had initially considered releasing the minors to father's care, but at the time of the detention he was homeless, with no income and subject to a restraining order prohibiting unsupervised contact with the minors. Father had since obtained housing but admitted he did not make enough from his gold mining to provide for the minors. The Department's main concern was father's ongoing anger issues regarding mother whom he blames for the dysfunctional relationship. The report concluded it would be detrimental to the emotional well-being of the minors to be placed in father's care. The recommended case plan included reunification services for both parents.

Father, who wanted a disposition of family maintenance, not reunification, requested a contested hearing. At the hearing in May 2014, the court first addressed the family law restraining order and father's request to modify the order to remove the minors as protected parties. Mother's counsel requested, and the parties agreed, to stipulate to the modification for the duration of the dependency case. Because the parties stipulated to the modification, the court did not receive father's declaration in support of his request in evidence. Father then asked the court to modify the portion of the restraining order that denied him access to the minors at school. Due to the fact that mother and father could encounter each other at the school, the court left the 100 yard stay-away order but modified it to allow father to be at the minors' school if permitted by the Department. The court stated that, based on the information in mother's original declaration, it was proceeding cautiously in modifying the restraining order and received

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[4] The Compassionate Use Act of 1996 (Prop. 215, § 1, as approved by voters, Gen. Elec. (Nov. 5, 1996) adding § 11362.5).

father's declaration on the request to modify only as to the school issue, not on the stipulation to remove the minors as protected persons.

The court proceeded with the contested disposition, receiving the Department's report and granting father's request to take judicial notice of the modified restraining order. The current social worker, Erin Sweet, testified she had assessed whether to place the minors with father based on several sources of information including the investigating social worker, Cathy Miller, who had also assessed the placement. Sweet believed that Miller was unable to place the minors with father due to father's homelessness, the restraining order, and his positive marijuana test. For her own subsequent assessment, Sweet went to the home father shared with his girlfriend and found it appropriate, although she had some concerns whether he could maintain it on his own. Sweet acknowledged the restraining order had now been modified to allow contact between father and the minors but noted he continued to test positive for marijuana, although that fact could not be the sole reason for rejecting the placement. Father had a Proposition 215 recommendation for his hip dislocation but the pain issues did not keep him from his occupation of going into the hills to pan gold. While father delayed in starting services, he was participating in parenting services and completed the drug assessment. The quality of father's visits was variable depending on the minors' moods when they arrived and father was mostly appropriate in dealing with them. Sweet felt placement with father was not yet appropriate due to conflicts between the parents, which remained volatile. Sweet believed the minors could suffer emotional harm if returned to either parent. Sweet testified Michael was aware of the conflict between the parents and his behavior in school and in the foster home was affected by it. Both mother and father call her frequently to complain of stalking and rude behavior and Sweet was concerned father could involve the minors in his conflicts with mother. Sweet noted that the facilitator of father's parenting group reported father was very focused on his relationship with mother

and that the parenting group was not the place to air such matters. Sweet said father was in denial about the domestic violence issues and she had referred him to counseling to deal with that and the relationship issues. Sweet believed the domestic violence issue between the parents had not been sufficiently addressed. Sweet testified father was not showing progress in services.

Father testified he was requesting placement of the minors, not services. Father explained he had not been homeless; he was just in housing that would not accommodate the minors but had secured housing where he could have them. He believed he could maintain the home even if he and his girlfriend were no longer together. Father testified he had completed the Parent Support Group after he got a referral and was not immediately referred to other parenting classes. He was currently in a parenting class and waiting for a second one. Father stated he had completed the drug assessment and was referred to Marijuana Anonymous. He occasionally attended the meetings but they were not necessarily beneficial to him. Father expressed his concerns about the restraining order limiting his time with the minors and making mediation about co-parenting functionally impossible. Father testified that the restraining order was based on mother's allegations that he assaulted her, but insisted the allegations were false and mother was making them up. Father acknowledged the restraining order was issued after a hearing. He had not engaged in any domestic violence courses or counseling after the restraining order issued. Father believed he could support the minors on his income from gold mining. He currently made $300 to $400 a month but has made as much as $4,000 during a month when he could work every day and as little as nothing when he could not work at all. Father explained it took about an hour to drive out to a place where he could leave his car and another 20 minutes to hike with his equipment to the mining site, sometimes having to make several trips before he could begin work, then he had to pack the equipment out and drive back when he left.

The investigating social worker, Cathy Miller, testified she assessed father for placement. Father had dealt with the allegations of the petitions in that he secured housing and was getting provisions and working on financial support to provide for the minors. While he had addressed those concerns, the restraining order was still in force and that was why she did not place the minors with him. She had no other concerns with father. She was aware of the domestic violence allegations and reviewed the police report of the incident. Miller knew that Michael was in counseling after the incident. Miller requested a Child Abuse Response Team (CART) interview of Michael because he might have seen the domestic violence incident. Miller opined that Michael's story in the CART interview did not match what he had told the investigator at the time of the incident. In the interview Michael said father threw mother on the ground and kicked her, he did not say that father had hit mother, which is what he told the sheriff. Miller acknowledged that it did not matter whether the striking was by hand or foot. However, she believed that Michael was coached so she had doubts about either of his accounts of the domestic violence incident. Nonetheless, she could not say with certainty that father had not hit or kicked mother. Miller agreed that both the existence of the restraining order and the underlying conduct needed to be resolved before placing the minors with father.

The court stated it had reviewed the testimony, disposition report and information in the family law file and would follow the Department's recommendation. The court was persuaded that there was a danger to the minors both emotionally and physically and that father had not benefitted from services. Although the restraining order was modified, the underlying issues between the parents, including father's anger, were not resolved. The court found father's testimony was not persuasive or candid. The court concluded Sweet had done more investigation than Miller into the issues and found Sweet's testimony more persuasive. The court was also not persuaded that Michael was

not a good historian, and there was ongoing domestic violence in front of the children. The court found father lacked insight into his need for domestic violence treatment and how his actions and lifestyle could impact the minors. Assessing all the evidence, the court found by clear and convincing evidence that placement of the minors with father would be detrimental and adopted the recommended findings and orders.

Further facts appear where relevant in the following discussion.

DISCUSSION

I. Due Process

Father contends he was denied due process by having the same judge hear the family law restraining order and the subsequent dependency proceedings. He asserts that the evidence shows that the "rulings are intermingled" and he was prejudiced because the minors were not placed with him as the noncustodial parent.

a. Father seems to argue that the mere fact that a judge issues a restraining order in a family law case creates an appearance of impropriety if the same judge is assigned to hear a dependency case involving the same family. Thus, the judge should take a waiver from the parties or recuse him- or herself from the second (dependency) case. We discern no violation of due process in having the same judicial officer preside over issuing a family law restraining order arising from a domestic violence incident perpetrated by father and a subsequent dependency proceeding arising from mother's physical abuse of, and injury to, one of the minors, absent any facts that would indicate judicial bias. No such facts appear in the record and father cites none.

b. Father recognizes that when a dependency petition is filed, the juvenile dependency court has exclusive jurisdiction over custody and visitation issues until the dependency is terminated. (§§ 302, 304; *A.H. v. Superior Court* (2013) 219 Cal.App.4th

1379, 1389.) Father argues that the court, by having the family law file before it, was acting as a family law judge and not exercising its dependency jurisdiction. We disagree.

In order to modify the restraining order, it was necessary to have the family law file available. There is no indication that the court was acting as anything other than a dependency court in modifying the restraining order since the modifications were directly related to furthering the custodial and visitation interests of the parents in the dependency proceeding. While the formal orders were placed in the family law file, this was necessary to protect father from possible charges of violation of a version of the restraining order that was no longer in effect.

c. In any case, father did not file a peremptory challenge to the judge at the detention hearing or at any other time during the dependency proceedings and never objected to having Judge Keithley preside over the dependency case. (Code Civ. Proc., § 170.6.) Having failed to timely object, he has forfeited the claim on appeal. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558; *In re Dakota S.* (2000) 85 Cal.App.4th 494, 501-502.) Further, to the extent that father requested, both in writing and orally, that Judge Keithley modify the family law restraining order, he invited any error which might have resulted. (*In re G.P.* (2014) 227 Cal.App.4th 1180, 1193 [" 'when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error' "].)

II. Sufficiency of Evidence to Support Jurisdiction

Father argues that substantial evidence does not support the jurisdictional allegations sustained against him. Father asserts that sustaining the petitions as modified, including the parents' denials of the allegations, rendered the petitions nonsense. He also argues that, by the time the petitions were sustained, there was no longer a housing issue and there was no evidence he would subject the minors to domestic violence based upon the single incident that formed the basis of the restraining order.

"The juvenile court exercises jurisdiction with respect to a child when the child has been endangered in any manner described by section 300; it acquires personal jurisdiction over the child's parents through proper notice." (*In re Christopher M.* (2014) 228 Cal.App.4th 1310, 1316.) Accordingly, when "a father challenges the evidentiary support for jurisdictional findings based on his conduct, but does not challenge the jurisdictional findings based on the mother's conduct, the appellate court may decline to address the father's challenge. This is because the juvenile court 'will still be entitled to assert jurisdiction over the minor on the basis of the unchallenged allegations. Further, the court will still be permitted to exercise personal jurisdiction over Father and adjudicate his parental rights, if any, since that jurisdiction is derivative of the court's jurisdiction over the minor and is unrelated to Father's role in creating the conditions justifying the court's assertion of dependency jurisdiction.' " (*Ibid.*)

Father acknowledges the foregoing principle but argues the jurisdictional finding had implications beyond the question of jurisdiction; it influenced the court to later deny him placement of the minors based on a single incident of domestic violence that was unlikely to recur. For that reason, he argues, the evidence supporting the jurisdictional finding should be reviewed.

We agree that when the jurisdictional finding could have additional consequences unrelated to jurisdiction, such as affecting the analysis of placement with a noncustodial parent, the appellate court has discretion to address the merits of the challenge. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.)

In the circumstances of this case, we decline to exercise that discretion. The allegations of the petitions as to father simply explained why the Department could not place the minors with him at the outset, i.e., that there was a restraining order in existence that prevented father from having unsupervised contact with the minors. That the restraining order was based upon an allegation of domestic violence was of no

importance to the question of jurisdiction since the incident preceded the facts which led to the minors' removal and the truth of the allegation was previously litigated in another forum resulting in an order that was final at the time the dependency case commenced. The dependency petitions did not contain any allegations that would make father an "offending" parent. Moreover, the allegations did not directly affect disposition since father sought, and received, a modification of the restraining order which permitted unsupervised contact with the minors, thereby leaving the application of section 361.2—regarding whether placement with father as a noncustodial parent would be detrimental to the minors—to be litigated in the contested dispositional hearing.

The court's jurisdictional finding that the minors came within the provisions of section 300 is supported by the unchallenged allegations that mother inflicted, and permitted another to inflict, physical abuse on the minors, placing them at risk of physical harm in her care.

III. Sufficiency of Evidence to Support Disposition

Father argues that substantial evidence does not support the juvenile court's finding that placement of the minors with him as the noncustodial parent would be detrimental to the minors.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence—that is, evidence which is reasonable, credible and of solid value—to support the conclusion of the trier of fact. (*In re Angelia P*. (1981) 28 Cal.3d 908, 924; *In re Jason L*. (1990) 222 Cal.App.3d 1206, 1214.) In making this determination, we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*In re Jason L., supra,* 222 Cal.App.3d at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) The reviewing court may not reweigh the

evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

When the court orders removal of a dependent child, "the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) Father was the noncustodial parent and clearly expressed a desire to assume custody of the minors. However, we conclude that substantial evidence supports the juvenile court's finding of detriment.

The evidence adduced at the dispositional hearing through report, testimony and judicial notice was that father perpetrated domestic violence on mother, that the two older minors were present and saw father hit mother. Michael was so affected by the incident that he required therapy and he remains affected by the stress of the ongoing conflicts between father and mother. Despite the adjudication in a contested hearing of the facts supporting the family law restraining order, father continued to insist that mother fabricated the incident and that he had not engaged in a violent attack on her. He continued to speak with the social worker about this and repeatedly raised the issue in his parenting group, failing to recognize that it was not an appropriate forum. Both parents continued to engage in negative behavior toward each other and report such incidents to the social worker. Father had not participated in anger management or domestic violence classes after the incident that resulted in the restraining order, and was in denial about the domestic violence issue. Both the investigating social worker and the case worker believed that the circumstances underlying the restraining order should be addressed

before placing the minors in father's care. While each parent's supervised visits went well, the underlying conflict between them placed the minors at risk of emotional harm.

Ample evidence supports the court's finding by clear and convincing evidence that placement with father before he has made progress in addressing the anger and domestic violence issues would be detrimental to the minors' emotional well-being.

IV. The ICWA

Father contends the court and the Department failed to comply with the inquiry and notice provisions of the ICWA.

The detention report stated that the ICWA might apply because mother claimed Cherokee heritage although father said he had no Indian ancestry. At the detention hearing, both parents filed ICWA-020 forms. Father checked the box on his form which stated, "I may have Indian ancestry" but gave no further information and did not designate any tribe. Mother, despite her earlier claim of Cherokee ancestry, now averred she had "no Indian ancestry." At the contested detention hearing in November 2013, the issues were submitted by counsel. The court found that the ICWA did not apply to the case.

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) The juvenile court and the Department have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court, rule 5.481(a).) Part of the duty of inquiry is to resolve conflicting information and to inform the court of the results so that the court can rule on the question of whether the ICWA applies. (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1198.)

Here, the reports and the ICWA-020 forms contained conflicting information on the parents' claims of Indian ancestry. Mother first claimed Cherokee then claimed no Indian ancestry. Father first claimed no Indian ancestry then indicated that he might have some Indian ancestry.

Father's claim, unsupported by any further information and in light of his earlier denial of any Indian heritage, is too vague to require further inquiry. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467-1468.) Similarly, mother's claim of Cherokee heritage followed by a conflicting claim of no Indian ancestry relieved the Department and the court of any further duties of inquiry or investigation because there was no longer any reason to believe that the minors might have Indian heritage. Accordingly, no notice was required. Because the case is in reunification, should either parent discover further information relating to his or her Indian heritage, the issue can be brought to the attention of the Department for further action.

DISPOSITION

The judgment of disposition is affirmed.

BUTZ, J.

We concur:

RAYE, P. J.

HULL, J.